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Via Electronic Delivery
The Honorable Kathy C. Hochul
Governor of New York
The Executive Chamber
State Capitol
Albany, New York 12224

The Honorable Andrea Stewart-Cousins
Majority Leader and President Pro Tempore
New York State Senate
3rd Floor State Capitol
Albany, New York 12224

The Honorable Carl C. Heastie
Speaker of the New York State Assembly
3rd Floor State Capitol
Albany, New York 12224

Re: Discovery Reform Proposal Analysis

Dear Governor Hochul, Majority Leader Stewart-Cousins, and Speaker Heastie:

The New York State Bar Association (NYSBA) is dedicated to addressing the administration of criminal justice. NYSBA efforts include bringing together legal professionals from the defense and prosecution to collaborate on improving the criminal justice system. NYSBA strongly supports the below detailed discovery proposals advanced by the Executive, as they are consistent with the recommendations of NYSBA's 2015 report regarding criminal discovery.

The overarching goal of discovery is to ensure a fair process. It is inconsistent with the goal of protecting public safety to allow criminal cases to continue to be dismissed for inconsequential errors that can be remedied in less drastic ways. As stated in NYSBA's 2015 Report on Discovery:

"When discoverable material is disclosed belatedly, the statute should instruct courts to provide a 'remedy' at trial *if the party entitled to disclosure is able to show that it was significantly prejudiced.*"[1] That remedy should only be available where there is a showing of prejudice due to discoverable material being lost or destroyed.[2] In the "rare" case when an "unscrupulous litigant" delays providing discovery in bad faith, the remedy should still require a showing of "some prejudice."[3]

Executive Proposal: Prosecution Discovery Compliance Loophole Closure Analysis

In 2015, NYSBA's Discovery Report recommended that New York not impose penalties on prosecutors or defense lawyers for rule violations and lapses that occur ***despite the parties' reasonable efforts to comply***, and instead the court should remedy violations when they are significantly prejudicial.[4] Nonetheless, under current law, if the prosecution files a certificate of compliance and answers ready for trial (thereby stopping the speedy trial clock), and if that certificate of compliance is found invalid by the court days, weeks, or even months later, the prosecution are *retroactively* charged with all the elapsed time, even if they answered ready for trial and good faith. The proposed reforms in S.3005-A/A.3005-A, Part B, §4 do three things to alleviate this problem:

1. sets a 35-day limit on the time the defense must challenge a certificate of compliance, which can be extended for good cause shown.
2. provides that the time elapsed from the filing of the certificate of compliance to the court's ruling invalidating the certificate of compliance will not be charged against the prosecution for speedy trial purposes.
3. provide that if the prosecution filed a certificate of compliance in good faith and subsequently obtained more discoverable material, they will suffer no consequences from providing that material to the defense and filing a supplemental certificate of compliance.

"Related to the subject matter of the case" vs. "Relevant to the subject matter of the charges."
Under CPL § 245.20(1), the prosecution is required to disclose, in short order, more than 20 categories of materials, if they "relate to the subject matter of the case." Some courts have interpreted this so broadly as to require disclosure of plainly irrelevant materials such as precinct personnel logs that have nothing to do with the charges, "audit trails" (that is, various types of technical metadata) from body worn cameras, and the original files of years-old (even decades-old) police disciplinary investigations that involve administrative matters having nothing to do

[1] NYSBA Report of the Task Force on Criminal Discovery Approved by the House of Delegates on January 30, 2015, p. 37. (https://nysba.org/wp-content/uploads/2020/02/Criminal-Discovery-Final-Report.pdf). Emphasis added.
[2] *Id* at 37
[3] *Id* at 56
[4] *Id*. at 36

with the charges at hand. The proposed revision amends this provision by replacing "related" with "relevant"—a standard that has deep roots in the law. The revised provision will continue to ensure that defendants receive all materials relevant to the case that could potentially aid the defense. Only irrelevant materials will be exempt from disclosure and retain the categories of disclosure enshrined in the 2020 reform.

Notably, the new relevance standard as proposed in S.3005-A/A.3005-A, Part B, §2 is consistent with existing paragraphs (c), (d) and (e) of CPL §240.25(1), which require disclosure of certain specified information that is relevant to an offense charged or to any potential defense.

The prosecution already has a constitutional duty to disclose exculpatory evidence and information that materially impeaches a prosecution witness. Moreover, CPL §245.20(1)(k), which the Executive proposal retains, requires prosecutors to disclose exculpatory and impeachment as part of their initial discovery obligations. Thus, this information will continue to be disclosed.

Good faith/due diligence/actual possession

In another commonsense reform, the proposal permits the prosecution to file a Certificate of Compliance (COC) when it has made good faith attempts, with due diligence, to obtain all discoverable material and has turned over all information. NYSBA's 2015 report stated a certificate of compliance filed in good faith should not in itself constitute any ground for litigation or for "penalizing" a prosecutor in any way, and the statute should make that clear.[5] Contrary to the objections of some advocates, this reform does not relieve the prosecution of their duty to disclose documents that are deemed to be under their control (such as police reports). Instead, as under current law, those documents are still deemed to be within the prosecution's control under CPL § 245.20(2), and a flow of information is still required under CPL § 245.55. The reform merely makes clear what is obvious: the Prosecution must turn over what they have been able to obtain after making good faith, diligent efforts, and they can certify as such.

30.30 and Prejudice Requirement

This reform ensures that justice will not be denied to victims or the public due to disclosure errors that caused no prejudice to the defense. Prior to the enactment of CPL Article 245, it was always the law in New York—as it is nationwide—that if evidence was withheld from the defense, the remedy is tailored to the harm caused by the error. Dismissal of a criminal charge is a drastic remedy that is imposed only when no other remedy can cure the error. Indeed, under the constitutional *Brady* rule, the withholding of exculpatory evidence will not result in dismissal unless the evidence is material, and no other remedy will suffice. *See People v. Campos*, 281 A.D.2d 638, 639 (2d Dept. 2001) ("failure to timely produce *Brady* material does not require a mistrial or dismissal if a less drastic remedy can cure any prejudice").

[5] *Id*. at 32

However, under CPL Article 245, if the prosecutor was deemed to have acted without due diligence regarding a particular piece of evidence, the COC will be invalidated—and a speedy trial dismissal will often result—no matter how inconsequential the error. The proposed reform amends this provision by stating that a COC will not be invalidated—and thus speedy trial time will not be charged—unless no other remedy cures the prejudice caused by the disclosure error.

This reform will have the added benefit of expediting the trial process. Under current law, defense attorneys have an incentive to file motions to invalidate COCs for inconsequential disclosure mistakes, in the hope of invalidating the COC and obtaining a speedy trial dismissal. This reform will disincentivize such motions unless the defense has been harmed by the error. As noted by NYSBA's 2015 analysis, this will streamline motion practice, ensure speedier dispositions, and prevent victims and the public from being denied justice for technical and inconsequential errors.[6]

Executive Proposal: Expanding Automatic Redaction Scope Analysis

NYSBA's 2015 report concluded that the relevant parties should receive the early disclosure of relevant information that is provided in other states with ***special procedures to ensure the safety of witnesses***.[7] The proposed revision protects the safety of victims and witnesses by permitting the redaction of personal information, such as addresses or other contact information, so long as the defense is provided with one form of adequate contact information. This allows the defense to interview potential witnesses while protecting victims and witnesses from harassment, intimidation, and even physical harm. As prosecutors are aware, such harassment and intimidation occurs frequently, especially in cases involving sexual assault, domestic violence, or organized criminal activity, including gang-related homicides. Protective orders are not always an adequate remedy, and having to continually seek protective orders in scores of cases places an undue burden on the courts, which must decide the motions, as well as on prosecutors. A defense should not be hampered in investigating, as adequate contact information must still be provided. Further, the defense can always ask the court to order additional discovery as necessary under CPL § 245.30(3).

Conclusion

In sum, the Executive's proposed reforms are necessary to correct unintended consequences caused by significant anomalies in the 2020 discovery legislation. CPL § 245.80 was intended to govern the remedy to be imposed for most discovery violations, and with these changes, it will operate as intended. Criminal trials will no longer center around endless searches for irrelevant materials in the hope of gaming a speedy trial dismissal. The criminal justice system will benefit victims, and

[6] *Id*. at 32
[7] *Id.* at 9, emphasis added

the public will obtain fair justice; and defendants will still have all the tools and materials they need to obtain a fair trial. There is every commonsense reason to support these reforms.

Please do not hesitate to contact me, or NYSBA's General Counsel, David Miranda, who can be reached at dmiranda@nysba.org, 518-487-5524 if you have further questions.

Respectfully,

Domenick Napoletano,
President